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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RESIDUAL INCOME
OPPORTUNITIES, INC. et al.,

Plaintiffs and Appellants,

v.

CYNERGY DATA, LLC,

Defendant and Respondent.

B289219

(Los Angeles County
Super. Ct. No. BC627326)

APPEAL from an order of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed in part and reversed in part.

Catanzarite, Kenneth J. Catanzarite and Brandon E. Woodward for Plaintiffs and Appellants.

Akerman, Joshua R. Mandell and Alicia Y. Hou for Defendant and Respondent.

Plaintiffs Residual Income Opportunities, Inc. and Reuven Cypers (together, RIO) appeal from the post-judgment order of the trial court denying RIO's motion to tax costs and granting the motion for attorney fees brought with the cost motion by respondent, Cynergy Data, LLC (Cynergy) as the prevailing party under the anti-SLAPP statute (Code Civ. Proc., § 425.16).¹ We reverse the cost award but affirm the attorney fees award.

BACKGROUND

RIO brought an action against numerous defendants, alleging, as against Cynergy, conspiracy to defraud and seeking to set aside a fraudulent transfer and declaratory relief. Cynergy demurred to the original complaint and first amended complaint. After it demurred to the first amended complaint, Cynergy filed an anti-SLAPP motion under section 425.16 to strike the causes of action against it. “‘SLAPP’ is an acronym for ‘[s]trategic lawsuit against public participation.’” (*Key v. Tyler* (2019) 34 Cal.App.5th 505, 509, fn. 1.)

The trial court granted Cynergy's special motion to strike and on August 3, 2017, Cynergy served the notice of entry of the order both electronically and by mail.

On October 3, 2017, Cynergy filed and served its memorandum of costs by mail and its notice of motion and motion for attorney fees by mail and electronically. Cynergy sought \$3,567.77 in costs and \$48,415.50 in attorney fees, plus \$5,500 in fees incurred for the reply and for attendance at the hearing on

¹ All statutory references are to the Code of Civil Procedure unless otherwise indicated.

the motions. RIO moved to tax the costs and opposed the attorney fees motion.

The trial court denied RIO's motion to tax costs and granted Cynergy's motion for attorney fees, awarding Cynergy the full amount of its requests: \$3,567.77 in costs and \$53,915.50 in attorney fees. RIO timely appealed.

DISCUSSION

I. The attorney fees motion

A. *Timeliness*

The determination of whether the trial court had the statutory authority to make an attorney fees award is a question of law that we review de novo. (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 460 (*Carpenter*).)

RIO contends that the trial court erred in ruling that Cynergy's attorney fees motion was timely filed. Under California Rules of Court, rule 3.1702(b)(1), an attorney fees motion "must be served and filed within the time for filing a notice of appeal under rules 8.104." Under the California Rules of Court, the time for filing a notice of appeal here was 60 days after service of the " 'Notice of Entry' " of judgment. (Cal. Rules of Court, rule 8.104(a)(1)(A) & (B).) Section 1010.6, subdivision (a)(4) provides for a two court-day extension of time to file when the triggering document is served electronically.² This extension

² In pertinent part section 1010.6, subdivision (a)(4)(A) in effect at the time Cyndergy filed its papers read, "Any period of notice . . . which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by *two court days*." (Italics added.)

is explicitly inapplicable to notices of appeal. (*Id.* former subd. (a)(4)(A)(iii).)³

Here, Cynergy served the triggering document, the notice of entry of order, both electronically and by mail on August 3, 2017. Cynergy served its motion for attorney’s fees on Thursday, October 3, 2017, 61 days later. Given the two court-day extension of time for electronic filing, the motion was timely.

RIO contends Cynergy could not file its motion for attorney fees beyond 60 days after service of its triggering notice of entry. Although difficult to decipher, RIO appears to reason that the time for filing an attorney fees motion is based on the time for filing a notice of appeal, and where extensions for filing notices of appeal are explicitly prohibited, the timeframe for filing an attorney fees motion likewise may not be extended. However, unlike appellate jurisdiction, which is dependent on strict compliance with the timing requirements for notices of appeal (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56), motions for attorney fees are not jurisdictional (*Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1727). Nowhere does the prohibition on extensions apply to non-jurisdictional motions for attorney fees.

B. *Reasonableness of the attorney fees*

A prevailing defendant on a special motion to strike is entitled to recover his or her reasonable attorney fees and costs

³ The exception states that the two-court day extension is inapplicable to “extend the time for filing any of the following: . . . [¶] (iii) A notice of appeal.” (§ 1010.6, former subd. (a)(4)(A).)

as a matter of right. (§ 425.16, subd. (c)(1); *569 E. County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 433 (*569 E. County*).) The party opposing such a motion has the burden to demonstrate that the fees claimed were inappropriate or unreasonable. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 563–564.)⁴

Although our determination whether a trial court has jurisdiction to make an attorney fees award is de novo, a court’s ruling on the propriety of an attorney fees award is reviewed for abuse of discretion. (*Carpenter, supra*, 151 Cal.App.4th at p. 460.) “ ‘The ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong[’]—meaning that it abused its discretion. [Citations.]” ’ [Citations.] Accordingly, there is no question our review must be highly deferential to the views of the trial court.” (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239 (*Nichols*).) “An abuse of discretion is shown when the award shocks the conscience or is not supported by the evidence.” (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549–550.)

“[T]he exercise of the trial court’s discretion ‘must be based on a proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that might justify application of a multiplier.’” (*Nichols, supra*,

⁴ Cynergy’s contention to the contrary notwithstanding, RIO’s brief repeats its opposition to the fee motion, which listed exactly those hours it felt were ambiguous or padded, i.e., duplicative and inefficient.

155 Cal.App.4th at pp. 1239–1240.) The “court begins by deciding ‘the reasonable hours spent’ on the case and multiplying that number by ‘the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type.’ [Citation.] The result is called the ‘lodestar’ figure. [Citation.] The court may then adjust the lodestar figure in light of a number of relevant factors that weigh in favor of augmentation or diminution.” (*Id.* at p. 1240.)

RIO contends that the issues here were “neither novel nor difficult” and so they did not justify the inefficient and duplicative, and thus padded, charges. For example, RIO cites what it considers to be charges for the same work done by two attorneys and argues that the work of researching and drafting the anti-SLAPP motion could have been done by one. RIO also argues that drafting a reply should not have required the length of time counsel charged.⁵ However, the judge who awarded fees here also heard the special motion to strike. He was well aware of how complex the issues were and is familiar with the time involved in anti-SLAPP litigation. Although “‘padding’ in the form of inefficient or duplicative efforts is not subject to compensation” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132), the court reviewed Cynergy’s billing records, as it was required to

⁵ RIO also argues that the court failed to reduce the fee award for the time two attorneys spent in reviewing written discovery, and drafting correspondence to RIO’s counsel about that discovery because discovery is stayed under the anti-SLAPP statute. (§ 425.16, subd. (g).) But, RIO inaccurately quotes the bills, which reflect that counsel researched the law of the *discovery stay*, the status of discovery demands, and drafted correspondence to RIO’s counsel *about the stay*.

do, and rejected RIO's duplication argument. We will not substitute our judgment for that of the trial court where it was not clearly wrong.⁶

Nor does RIO carry its burden in challenging the award for time spent by Cynergy's paralegal. RIO observes that Cynergy's motion did not establish that the paralegal met the professional requirements for a paralegal license. (Bus. & Prof. Code, § 6450 et seq.) The trial court properly rejected this contention. "[T]he verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.) Other than to cite the professional requirements for a paralegal, RIO has not shown why the records must demonstrate her license.

RIO next contends that the fee motion contained improperly " 'vague' block billing" that obscured the nature of the work claimed. Block billing is not per se objectionable. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325.) Reviewing the attorney documentation attached to

⁶ RIO contends that the trial court erroneously allowed Cynergy to collect for 11.5 hours for "factual and legal investigation and research" because "[i]nvestigation expenses" are not recoverable as costs under section 1033.5, subdivision (b)(2). But, Cynergy sought to recover that time in its attorney fees motion, not in its cost memorandum. Moreover, our review of Cynergy's fee motion shows that the request for time spent in legal research and investigation was properly related to the anti-SLAPP motion only. (*569 E. County, supra*, 6 Cal.App.5th at p. 433.)

the fee motion, we agree with the trial court that the bills' descriptions of work were not ambiguous.

Beyond reviewing the time Cynergy's attorneys spent on the anti-SLAPP motion, the trial court considered the hourly rate claimed for attorneys Marsh (\$790), Mandell (\$520), and King (\$330). Based on its own experience and that of Cynergy's attorneys, the court found those rates to be reasonable. Without citation to authority or evidence, RIO contends these rates "are not close to [those of] other attorneys in the community." In contrast, attorney Marsh's declaration in support of the attorney fees motion averred that the rates his firm requested "are reasonable and in line with the market rates of lawyers of similar experience at law firms of similar size and reputation." "[T]he trial court has its own expertise in determining the value of legal services performed in a case" (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 155), and "application of a lodestar multiplier is discretionary" (*Nichols, supra*, 155 Cal.App.4th at p. 1240, *italics omitted*). We do not see that the court abused its discretion in approving these rates, particularly where the actual award reflected a 15 percent across-the-board reduction in the fees, voluntarily taken by Cynergy's attorneys.

II. The cost memorandum

RIO contends that the cost memorandum was untimely. As noted, Cynergy served the notice of entry of the order granting the anti-SLAPP motion both electronically and by mail on August 3, 2017. Cynergy filed and served its memorandum of costs by mail on October 3, 2017 from Los Angeles, *46 days beyond the 15-day filing period*.

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her . . . costs." (§ 425.16, subd. (c).)

California Rules of Court, rule 3.1700, which governs claims for costs, reads: “A prevailing party who claims *costs* must serve and file a memorandum of costs within 15 days after . . . the date of service of written notice of entry of *judgment or dismissal*.” (Cal. Rules of Court, rule 3.1700(a)(1), italics added.)

Cynergy argues that the order granting the anti-SLAPP motion was not a judgment or dismissal, with the result that the trial court properly considered the cost memorandum.⁷ Cynergy cites *Daniels v. Robbins* (2010) 182 Cal.App.4th 204. That court held that because the minute order granting the anti-SLAPP motion was *unsigned*, it did not qualify as a dismissal under section 581d and so the trial court properly considered the cost memorandum filed 37 days later. (*Daniels*, at p. 229.) Section 581d reads, “All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes.” Here, the order granting Cynergy’s anti-SLAPP motion *was signed* by the trial court and entered in the court’s register.

While signed, the order granting Cynergy’s special motion to strike did not state that Cynergy was dismissed from the action. Nonetheless, the order qualifies as a judgment. Section 577 defines a judgment as “the final determination of the rights of the parties in an action or proceeding.” “[A] judgment, no matter how designated, is the final determination of the rights of the parties in an action. Thus, an ‘order’ which is the final determination in the action is the judgment.” (*Passavanti v.*

⁷ Cynergy also cites *Carpenter*, *supra*, 151 Cal.App.4th 454 for this proposition, but *Carpenter* does not involve cost memoranda under California Rules of Court, rule 3.1700.

Williams (1990) 225 Cal.App.3d 1602, 1606.) “ ‘In “determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable . . . [i]t is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.” ’ ” (*Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 995–996.) Here, Cynergy specially moved to strike RIO’s causes of action for fraudulent transfer and conspiracy to defraud. The declaratory relief claim was based on those causes of action and suffered the same fate as they. Therefore, the substance and effect of the order granting Cynergy’s special motion to strike was to finally dispose of all causes of action against it. The signed order constituted a judgment for purposes of California Rules of Court, rule 3.1700. (§§ 581d & 577.)

As the order granting the special motion to strike was a judgment, it triggered the 15-day timeframe in California Rules of Court, rule 3.1700(a)(1) for filing the cost memorandum. “ ‘The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory.’ ” (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 426.) Although California Rules of Court, rule 3.1700 gives the trial court discretion to extend the time for serving and filing cost memoranda, it may only do so for a “period not to exceed 30 days.” (Cal. Rules of Court,

rule 3.1700(b)(3).) With all of the allowable extensions, namely the 15-day filing period (Cal. Rules of Court, rule 3.1700(a)), plus the five-day extension for mailing the memorandum (Code Civ. Proc., § 1013, subd. (a)),⁸ plus the maximum 30-day discretionary extension (Cal. Rules of Court, rule 3.1700(b)(3)), Cynergy had 50 days from August 3, 2017 to file its memorandum of costs, or until September 22, 2017. The trial court had no authority to consider the cost memorandum filed on October 3, 2017.

For an error to be reversible, it must have caused prejudice to the complaining party. (Cal. Const., art. VI, § 13.) RIO accurately observes that the trial court erroneously allowed Cynergy to recover costs that were unrelated to the anti-SLAPP motion. As noted, the prevailing defendant may recover only those fees and costs incurred in connection with the anti-SLAPP motion; not for costs incurred for the entire action. (*569 E. County, supra*, 6 Cal.App.5th at p. 433.) It is error to award costs for the entire suit. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1383.) The cost memorandum contains, in addition to costs for the anti-SLAPP-related filings, extensive costs associated with a demurrer.

⁸ Subdivision (a) of section 1013 provides that service by mail is complete at the time of deposit in a post office or mailbox, “but, any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court.”

To justify the costs for the demurrer, Cynergy cites *Metabolife Intern., Inc. v. Wornick* (S.D. Cal. 2002) 213 F.Supp.2d 1220, and argues that pleading was connected to the anti-SLAPP motion because Cynergy “needed to file a demurrer and force Appellants to replead in order to learn of Appellants’ anti-SLAPP violations which were previously hidden through vague and ambiguous pleadings.” The argument is unavailing. First, *Metabolife* is a federal opinion and “ ‘a decision of a federal district court has no precedential value in this court; at best, it is persuasive authority only.’ ” (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1074.) Second, the record contradicts Cynergy’s assertion. Cynergy demurred and RIO filed the first amended complaint. A month later, Cynergy filed its second demurrer. Two months later, it filed its special motion to strike the first amended complaint. Had the first demurrer successfully focused the complaint, there would have been no need for the second demurrer. Clearly, the second demurrer was unnecessary to clarify whether the new version of the complaint was a SLAPP action because Cynergy filed its anti-SLAPP motion *without waiting for a new version of the complaint*. Therefore, RIO was prejudiced by the trial court’s error in awarding Cynergy costs for a demurrer and so the cost award must be reversed.

DISPOSITION

The portion of the order awarding Cynergy its costs is reversed. The portion of the order awarding Cynergy attorney fees is affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.